RE SASHIDARAN KV NAIR; EX P ALLIANCE BANK MALAYSIA BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[BANKRUPTCY NO: MT1-29-843-2004]
18 JULY 2006

BANKRUPTCY: *Notice - Setting aside - Default judgment - Default judgment affirmed by High Court on appeal and no stay order granted thereof - Whether a final judgment - Bankruptcy notice - Whether premised upon final judgment - Whether valid - Section 3(1)(i) Bankruptcy Act 1967 - Whether complied with*

The judgment creditor herein ('JC') had obtained a default judgment for a liquidated sum against the judgment debtor ('JD'). The JD applied to set aside the judgment but the application was dismissed by the Sessions Court on 24 June 2004. The JD appealed against the dismissal and applied for a stay of the judgment, but the appeal and the application were dismissed by the High Court and the Sessions Court respectively. The JD appealed against the lower court's refusal to grant stay, but did not apply for a stay of the High Court's decision. In the meanwhile, the JC served the bankruptcy notice on the JD. The bankruptcy notice, however, was set aside by the registrar ruling that the same was not premised upon on a final judgment as required by s. 3(1)(i) of the Bankruptcy Act 1967 ('the Act'), and was hence flawed. The JC appealed. Before the learned judge, the JC argued that the registrar was wrong in not treating the default judgment as a final judgement, as the same had become a final judgment on 24 June 2004 when the JD's application to set it aside was dismissed by the Sessions Court. The JD reiterated its stand that the default judgment was not a final judgment citing in support thereof *Re Udos Ak Riging, Ex p Seabanc Kredit Sdn Bhd.* The primary issue that arose was whether, for the purposes of s. 3(1)(i) of the Act, the default judgment herein was or was not a final judgment.

Held (allowing the appeal and reinstating the bankruptcy notice):

(1) Section 3(1)(i) stipulates the requirement of a final judgment on which execution has not been stayed. For this purpose, the proviso thereto creates a presumption that any person who

A is for the time being entitled to enforce a final judgment or final order, is a creditor who has obtained a final judgment or final order. (para 13)

(2) *Re Udos Ak Riging* was not applied in *Re Tan Hwee Earn Ex p The People's Insurance Company (M) Sdn Bhd* where Steve B Shim J (as he then was), relying on the Supreme Court judgment of *Adzmi bin Ali & Anor v. Mohamed Isa bin Kasad*, held that the default judgment constituted a final judgment for the liquidated sum claimed by the judgment creditor against C the judgment debtor. On the facts, this court would associate itself with the sentiment expressed in *Tan Hwee Earn* and *Adzmi bin Ali.* (paras 15 & 16)

(3) The JD in this case has exhausted his right of appeal against the default judgment as his appeal has been heard and D determined by this court who also affirmed the default judgment. Hence, the rights of the parties have been reaffirmed and finally determined in the High Court. Further, as the JD has not applied for a stay of the default judgment in the High Court, and the appeal against the Sessions E Court's refusal of stay has since been superseded by the High Court judgment on appeal, there was no legal impediment for the issuance of the bankruptcy notice against the JD. (paras 17 & 18)

F **(4)** The judgment creditor has complied with the requirement of a final judgment contained in the principal provision of s. 3(1)(i) of the Act, and the JC is deemed to be entitled to enforce as a creditor under the proviso thereto. The answer to the issue for determination is therefore in the affirmative and it follows G that the learned registrar has erred in arriving at the aforesaid decision. (paras 19 & 20)

Case(s) referred to:

Adzmi Ali & Anor v. Mohamed Isa Kasad [1987] 1 CLJ 445; [1987] CLJ (Rep) 37 SC ***(foll)***

H *Affin Bank Bhd v. Tan Sri Kishu Tirathrai [2004] 3 CLJ 350 HC* ***(refd)***

Badrul Zaman PS Md Zakariah v. Jabatan Penyiaran Radio Dan Television Malaysia & Ors [2001] 2 CLJ 623 HC ***(refd)***

Blundell v. Rimmer [1971] 1 All ER 1072 ***(refd)***

Bozson v. Altrincham Urban District Council [1903] 1 KB 547 ***(refd)***

I *Hong Kim Sui & Anor v. Malayan Banking Bhd [1971] 1 MLJ 289* ***(refd)***

Ng Cheng Yoon v. Mah Mat Isa [1981] 1 MLJ 218 FC ***(refd)***

Ong Ah Kooi v. Public Finance Bhd [1992] 1 CLJ 177; [1992] 3 CLJ (Rep) 156 HC ***(refd)***
Pembangunan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 SC ***(refd)***
Peninsular Land Development Sdn Bhd v. K Ahmad (No 2) [1970] 1 MLJ 253 FC ***(refd)***
Ratnam v. Cummarasamy & Anor [1962] MLJ 330 ***(refd)***
Re Dr R Ramachandran ex p Ganeswary Ponnudurai [2002] 4 AMR 4409 HC ***(refd)***
Re Mohamad Fadzimi Yaakub; ex p United Malayan Banking Corp Bhd [1998] 1 CLJ 783 HC ***(foll)***
Re Tan Ah Poi, ex p Multi-Purpose Finance Bhd [1999] 2 CLJ 694 HC ***(foll)***
Re Tan Hwee Earn; ex p The People's Insurance Company (M) Sdn Bhd [1999] 4 CLJ 325 HC ***(foll)***
Re Udos Riging; ex p Seabanc Kredit Sdn Bhd [1994] 3 MLJ 383 HC ***(not foll)***
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 SC ***(refd)***
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Rules of the High Court 1980, O. 13 r. 1(1), O. 19 r. 2

Other source(s) referred to:
Khoo Kay Ping, *Law and Practice of Bankruptcy in Malaysia*, para 4.2.2.1

For the judgment debtor - Ravinathan Muthiah; M/s Ravi Muthiah & Co
For the judgment creditor - Low Kiang Kiau; M/s Low & Lee

Reported by WA Sharif

JUDGMENT

Low Hop Bing J:

Appeal

[1] This is an appeal in encl. (13) filed by the appellant-judgment creditor ("JC") against the decision of the learned registrar who had on 24 August 2005 allowed the respondent-judgment debtor's ("JD's") application in encl. (9) to strike out with costs the JC's bankruptcy notice.

[2] Unless the context otherwise requires or otherwise stated, a reference hereinafter to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980.

Factual Background

[3] On 1 August 2003, the JC obtained a default judgment for a liquidated sum against the JD in Melaka sessions court civil action No. 52-21-1995 pursuant to a hire-purchase agreement to which the JD was a guarantor. The JD's application to set aside the default judgment was dismissed by the sessions court on 24 June 2004. The JD had on 6 July 2004 filed an appeal which in turn had been dismissed by me on 27 June 2006. Thereafter, until today, the JD has not filed an application for stay of the said judgment.

[4] Earlier, on 12 August 2004, the JD filed an application for stay of execution of the default judgment in the sessions court. That application was dismissed by the sessions court on 8 October 2004, against which the JD had on 21 October 2004 filed an appeal to the judge in chambers. The appeal against the sessions court's refusal of the stay has now been superseded by the dismissal of the JD's appeal against the default judgment.

[5] The JC by way of letter dated 22 June 2005 served on the JD the request for the issue of bankruptcy notice as well as the bankruptcy notice dated 27 December 2004 (collectively "the bankruptcy notice").

[6] *Vide* summons in chambers (encl. (9)), the JD sought to strike out the bankruptcy notice on the basis *inter alia* that the default judgment was not a final judgment for the purposes of issuing the bankruptcy notice and so it was said to be an abuse of process of the law.

Rehearing

[7] It is trite law that:

(1) The appeal from a registrar to a judge in chambers is by way of an actual rehearing and the matter is to be treated as though it comes before the judge for the first time, and not confined to the points taken before the registrar: see *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241 FC per Edgar Joseph Jr FCJ (as he then was); and

(2) A judge in chambers hearing an appeal from a discretionary order of the registrar shall exercise his own discretion unfettered by the previous exercise of the registrar's discretion, but giving the registrar's decision whatever weight it deserves: *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716 SC per Edgar Joseph Jr SCJ (as he then was); and *Blundell v. Rimmer* [1971] 1 All ER 1072 (1076) per Payne J.

Final Judgment

[8] It was contended by learned counsel Mr. Low Kiang Kiau for the JC that on the facts, for the purposes of s. 3(1)(i) of the Bankruptcy Act 1967, the default judgment had become a final judgment on 24 June 2004 when the JD's application to set it aside was dismissed by the sessions court citing:

(1) *Re Dr. R Ramachandran; ex p Ganeswary a/p Ponnudurai* [2002] 4 AMR 4409 HC;

(2) *Peninsular Land Development Sdn. Bhd. v. K. Ahmad (No. 2)* [1970] 1 MLJ 253 FC;

(3) *Badrul Zaman PS Md Zakariah v. Jabatan Penyiaran Radio Dan Television Malaysia & Ors* [2001] 2 CLJ 623 HC;

(4) *Re Tan Hwee Earn; ex p The People's Insurance Company (M) Sdn Bhd* [1999] 4 CLJ 325 HC;

(5) *Adzmi bin Ali & Anor. v. Mohamed Isa bin Kasad* [1987] 1 CLJ 445; [1987] CLJ (Rep) 37 SC;

(6) *Re Mohamad Fadzimi Yaakub; ex p United Malayan Banking Corp Bhd* [1998] 1 CLJ 783 HC;

(7) *Pembangunan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 SC;

(8) *Re Tan Ah Poi, Ex p Multi-Purpose Finance Bhd* [1999] 2 CLJ 694 HC;

(9) *Ng Cheng Yoon v. Mah binti Mat Isa* [1981] 1 MLJ 218 FC; and

(10) *Affin Bank Bhd v. Tan Sri Kishu Tirathrai* [2004] 3 CLJ 350 HC.

[9] JD's learned counsel Mr. Ravinathan Muthiah subscribed to a contrary view and contended that the bankruptcy notice is invalid, citing:

(1) *Re Udos Ak Riging; ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383 HC;

(2) *Law and Practice of Bankruptcy in Malaysia* para 4.2..2.1 by Khoo Kay Ping; and

(3) *Ng Cheng Yoon, supra.*

[10] After a careful consideration of the above submissions and the decision of the learned registrar and having regard to the above factual background, I am of the view that the issue for determination may be formulated as follows:

> For the purposes of s. 3(1)(i) of the Bankruptcy Act 1967, is a default judgment for a liquidated sum a final judgment when it was obtained by the judgment creditor in the sessions court and affirmed by a judge of the High Court on appeal and there has been no stay of execution?

[11] First, I shall set out some illustrations of "final judgment".

(1) An *ex parte* order which came about after the judgment creditor had successfully obtained an injunction with costs against a company and which disposes of the rights of the parties finally, as in *Re Dr R Ramachandran, supra*, per Suriyadi bin Halim Omar J, or if no further step is necessary to perfect it: *Ong Ah Kooi v. Public Finance Bhd* [1992] 1 CLJ 177; [1992] 3 CLJ (Rep) 156 per Abdul Malik Ishak J; *The Law and Practice of Bankruptcy in Malaysia* by Khoo Kay Ping at p 25; *Peninsular Land Development, supra*, per Azmi LP (as he then was); and *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547, per Lord Alverstone CJ;

(2) An order of the court granting leave to the respondent to sign final judgment on the specially indorsed writ: per Azmi LP in *Peninsular Land Development Sdn Bhd, supra*, at p 254 I left to C right;

(3) A summary judgment for specific performance of an agreement for sale of land, as in *Ng Cheng Yoon, supra*, per Wan Suleiman FJ (as he then was), applying *Ratnam v.*

Cummarasamy & Anor. [1962] MLJ 330; *Peninsular Land Development, supra;* and *Hong Kim Sui & Anor. v. Malayan Banking Bhd.* [1971] 1 MLJ 289;

(4) A judgment entered for the plaintiff against the defendant under O. 19 r. 2 when the defendant fails to file a defence against a claim for liquidated damages, as in *Badrul Zaman, supra,* at p 625h per RK Nathan J (as he then was);

(5) A default judgment for the liquidated sum claimed by the judgment creditor against the judgment debtor, as in *Re Tan Hwee Earn, supra,* at p 328 a-g where Steve Shim J (later CJ (Sabah & Sarawak)) declined to apply the decision in *Re Udos ak Riging, supra,* but instead followed *Adzmi bin Ali, supra*;

(6) A judgment for a liquidated sum entered against a defendant under O. 13 r. 1(1) when the defendant fails to enter an appearance within the specific time, as in *Adzmi bin Ali, supra,* SC per Seah SCJ;

(7) A judgment on which the creditor is in a position to issue execution: see eg, *Re Mohamad Fadzimi Yaakub supra,* at p. 790 e-f per T Selventhiranathan J;

(8) A default judgment until set aside is a good and enforceable judgment, as in *Pembangunan KSY Sdn Bhd, supra,* per Hashim Yeop A Sani CJ (Malaya) (as he then was);

(9) A High Court judgment which is pending appeal before the Court of Appeal is a final and conclusive judgment for the purposes of a final judgment in s. 3(1)(i), which must be given its strict and proper meaning, notwithstanding the fact that it is subject to an appeal or under appeal and that there is a possibility that the Court of Appeal will allow the appeal, as that judgment has finally disposed of the rights of the parties, as in *Re Tan Ah Poi, supra,* at p 698 h-i, per Abdul Malik Ishak J; and

(10) A summary judgment against which there had been no stay of execution or appeal, as in *Affin Bank Bhd, supra,* at pp 353 b-h and 354 a-d.

[12] As this appeal concerns the interpretation of s. 3(1)(i), the relevant portion thereof merits reproduction as follows:

3 Act of bankruptcy

(1) A debtor commits an act of bankruptcy in each of the following cases:

(a) ...;

(b) ...;

(c) ...;

(d) ...;

(e) ...;

(f) ...;

(g) ...;

(h) ...;

(i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has been served on him in the Federation ... a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order ...; and he does not within seven days after service of the notice ... comply with the requirements of the notice ...

Provided that for the purposes of this paragraph ... any person who is entitled to enforce a **final judgment** or final order shall be deemed to be a creditor who has obtained a **final judgment** or final order. (Emphasis added)

[13] In my view, s. 3(1)(i) stipulates the requirement of a final judgment on which execution has not been stayed, and for this purpose the proviso thereto creates a presumption that any person, who is for the time being entitled to enforce a final judgment or final order, is a creditor who has obtained a final judgment or final order.

[14] *Re Udos ak Riging, supra,* has been heavily relied upon by the JD in support of the contention that the default judgment is not final for the purposes of s. 3(1)(i). That contention has been upheld by the learned registrar. I shall therefore give it a more analytical treatment. There, the essential facts reveal that the

petitioning creditor had obtained judgment in default against *inter alia* the judgment debtor who had applied to set it aside. While awaiting the hearing of the application, the judgment creditor served a bankruptcy notice on the debtor who then filed an affidavit to have the bankruptcy notice set aside on the ground *inter alia* that his application to set aside the judgment had not yet been heard. The magistrate dismissed the debtor's application to set aside the default judgment. The debtor appealed to the High Court where the appeal was still pending. The issue for determination was whether the default judgment at the time of the issue of the bankruptcy notice was a final judgment. Abdul Kadir Sulaiman J (later FCJ) said:

> Under s. 3(1)(i) of the Act, a bankruptcy notice is to issue only on a final judgment or final order and execution thereon not having been stayed.
>
> ... I am of the view that, for the purpose of bankruptcy proceedings ..., the default judgment at the time of the issue of the bankruptcy notice, which in this case was on 18 March 1994, is not a final judgment. This is so because, the judgment being a default one owing to the absence of the debtor at the hearing of the suit by the judgment creditor against him is not a judgment on the merit. Any judgment given not on merit is liable to be set aside on an application made. If that be so, the default judgment when entered did not finally dispose of the rights of the parties. In this case O. 29 of the SCR allows the debtor to do so within the period of 30 days. If he does not do so, then and only then, the said default judgment would crystallize into a final judgment. If this happens, after the expiration of these 30 days, the judgment creditor is entitled to request for a bankruptcy notice to be issued. However, in this case, the debtor within time had filed his application to have the said default judgment set aside. On 7 June 1994, the learned magistrate heard the debtor's application to set aside the default judgment and the application was dismissed. If this matter rested there, then the original default judgment became a final judgment. But it did not, for on 9 June 1994 the debtor exercised his right provided by law by filing an appeal with the High Court against the decision of the learned magistrate disallowing his application. So by the act of the debtor challenging the default judgment made against him, at that stage the judgment did not become final as yet. So the issue of a bankruptcy notice pursuant to that judgment would not as yet have arisen. In my view, the said judgment will only be a final one after the debtor has exhausted his remedy given by law.

[15] As alluded to above, *Re Udos ak Riging, supra,* was not applied in *Re Tan Swee Earn, supra,* where the judgment creditor had obtained a default judgment against the judgment debtor, against whom the creditor subsequently filed a bankruptcy notice which the debtor sought to set aside but failed before the registrar. The debtor appealed to the judge in chambers on the ground *inter alia* that the default judgment was not a final judgment under s. 3(1)(i). The appeal was dismissed by Steve Shim J (later CJ (Sabah & Sarawak)) who held that the default judgment constituted a final judgment for the liquidated sum claimed by the judgment creditor against the judgment debtor, relying on Supreme Court judgment delivered by Seah SCJ in *Adzmi bin Ali, supra,* which was more in point, where it was held that if the claim was for a debt or liquidated sum and the defendant defaulted in entering appearance, final judgment for the sum could be entered against him.

[16] I associate myself with the sentiment expressed by Steve Shim J (now CJ (Sabah & Sarawak)) in *Tan Hwee Earn, supra.* I also follow the authoritative judgment of the Supreme Court in *Adzmi bin Ali, supra*. In addition, the weight of authorities particularly *Re Mohamad Fadzimi Yaakub, supra;* and *Re Tan Ah Poi, supra,* would miltate against the JD's contention herein.

[17] Quite apart from that, the factual matrix in the instant appeal is even more tenacious to the JC before me than the JC in *Udos ak Riging, supra*. Here, the JD has exhausted his right of appeal against the default judgment as the JD's appeal has been heard and determined before me and I have affirmed the default judgment. Hence the rights of the parties herein have been reaffirmed and finally determined in the High Court.

[18] Further, as the JD has so far not filed any application for stay of the default judgment in the High Court, and the appeal against the sessions court's refusal of stay has now been superseded by the High Court judgment on appeal, there is no legal impediment to the judgment creditor's issuance of the bankruptcy notice against the judgment debtor.

[19] In the circumstances, I am of the view that the judgment creditor has complied with the requirement of a final judgment contained in the principal provision of s. 3(1)(i), pursuant to which the judgment creditor is deemed to be entitled to enforce as a creditor under the proviso thereto.

[20] The answer to the above issue for determination is therefore in the affirmative.

Conclusion

[21] On the foregoing grounds, I hold that the learned registrar has erred in arriving at the aforesaid decision. I therefore allow this appeal with costs, set aside the registrar's decision and reinstate the bankruptcy notice.